

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

GOLDEN BETHUNE-HILL, et al.,
vs.
VIRGINIA STATE BOARD OF ELECTIONS,
et al.

:
:
: Civil Action No.
: 3:14CV852
:
: July 12, 2017
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COMPLETE TRANSCRIPT OF THE CONFERENCE CALL

HEARD BEFORE: THE HONORABLE ROBERT E. PAYNE
THE HONORABLE ARENDA L. WRIGHT ALLEN
THE HONORABLE BARBARA M. KEENAN

APPEARANCES:

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P R O C E E D I N G S

JUDGE PAYNE: Hello. Starting with counsel for the plaintiff, please identify yourselves and who you represent, and when you speak, give your name. The judges don't have to do that because the court reporter knows who they are.

MR. HAMILTON: Good morning, Your Honor. Kevin Hamilton from the law firm Perkins Coie on behalf of the plaintiffs.

MR. RAPHAEL: Good morning. Stuart Raphael from the Office of Attorney General of Virginia for the defendants.

MS. McKNIGHT: Good morning, Your Honor. This is Kate McKnight from BakerHostetler, counsel for defendant intervenors and along with me...

MR. BRADEN: Mark Braden who is also counsel for the defendant intervenors.

JUDGE PAYNE: All right. We have a motion for amendment of the scheduling order that you all have tendered and a response to it. There is no reply, and I think we would -- the Court would like to hear from you on the continuance motion which is what the motion to amend is.

In that regard, I think it's safe to say that the -- we don't really need to hear much about the problems created for the people who are running for reelection, that the real issue is a case management question and why we're having so

1 much in the way of evidence and how we can get that down and
2 still keep a trial date or why we need to move it. I think
3 that would be the most helpful to us, and then when we have
4 questions, we'll intercede and ask questions.

5 We have your joint discovery plan which was filed
6 last night, but, frankly, it was filed after I left, and I
7 haven't really studied it much. I'll try to take a look at it.
8 I don't know if the other judges have even had a chance to look
9 at it either, but I appreciate --

10 JUDGE KEENAN: I looked at it this morning.

11 JUDGE PAYNE: Okay. You all want to proceed? Who is
12 going to argue, Ms. McKnight, Mr. Braden, who?

13 MR. BRADEN: Mark Braden for the defendant
14 intervenors. Your Honors, the reason why we are proposing
15 changing the date for the trial, I won't go into, since the
16 Court has asked me not, to the notion of inconvenience. I
17 would suggest it's more than inconvenience. It would result in
18 many people not appearing, witnesses who would otherwise appear
19 as witnesses because of the political situation.

20 JUDGE PAYNE: Whoa, whoa, whoa. Excuse me one
21 minute. You have the subpoena power, and they can appear, or
22 they can appear by deposition. That contention is something
23 that really isn't pushed in your papers, that is that they
24 can't appear. It's pushed in your papers as inconvenience.
25 Why would it not be possible for you to use the subpoena power

1 and have those people come to a deposition which would be very
2 short and to attend a trial which would be very short?

3 They could be put on, and we could schedule around
4 their -- around the other witnesses so that they wouldn't have
5 to be there very long. I actually don't understand why you are
6 saying they wouldn't testify.

7 MR. BRADEN: Your Honor, they are in a position to
8 assert legislative privilege. I do not believe -- my
9 understanding of Virginia law and the scope of legislative
10 privilege, that we could not ask them specific questions about
11 why they supported a piece of legislation which would, in fact,
12 be the plan.

13 JUDGE PAYNE: Wait a minute, Mr. Braden. That
14 doesn't have anything to do -- if they can't testify about that
15 at all, then why -- that's not -- they wouldn't testify about
16 it if they came, they wouldn't -- you wouldn't be deprived of
17 that testimony because they couldn't come.

18 MR. BRADEN: Your Honor, they can certainly waive
19 legislative privilege, and, to be candid, we shouldn't pretend
20 this doesn't involve politics. Ten of the 12 who are presently
21 running for reelection are in hotly contested elections. Not
22 surprisingly, when we reached out to them now, we have found
23 out, do I want to subject myself to a deposition and testimony
24 and cross-examination in the midst of my campaign for
25 reelection? The answer to that has been generally no, they are

1 not anxious to do that.

2 JUDGE PAYNE: But the legislative privilege you are
3 talking about does not protect them from giving testimony in
4 this case if they are subpoenaed, does it?

5 MR. BRADEN: Well, it certainly would prohibit us
6 from asking them the questions about why they voted for the
7 plan and their reasoning behind voting for the plan.

8 JUDGE PAYNE: But, Mr. Braden, that would be the case
9 whether they were running for reelection or not, would it not?

10 MR. BRADEN: No, I do not believe. Postelection, all
11 these individuals postelection, I believe almost without
12 exception with the ones we've spoken to so far, are willing to
13 waive their privilege which is a personal privilege. So it's
14 their decision as to whether to testify or not. Prior to the
15 election they are not anxious, not surprisingly, to testify,
16 reluctant to testify, especially when they'll be cross-examined
17 by someone representing the opposing party.

18 So there's a great deal of reluctance prior to the
19 election to come and testify. Frankly, this Court will get
20 more testimony from these individuals who are the individuals
21 in the best position to describe the particular lines of their
22 district of anyone, period, anyone. And they will come, most
23 of them I believe, come and testify about that postelection.
24 We're going to have great difficulty getting these people who
25 have the most relevant evidence for this Court about the

1 particular lines of their particular district adjoining the
2 contested district if the trial is moved to as we indicated.

3 Our mistake in our proposal to the Court was using
4 the term October. We should have said November/December.

5 JUDGE KEENAN: Mr. Braden, excuse me. This is Judge
6 Keenan. I have a question. When you say that these
7 legislators and candidates and continuing candidates for
8 reelection would not be willing to testify, are you saying that
9 this is a matter of time constraints, or are you saying that
10 they are unwilling to discuss the substance of their
11 decision-making process?

12 MR. BRADEN: Your Honor, I believe it's actually a
13 combination of both. We've reached out to the individuals.
14 This is, obviously, a significant difficulty for a person who
15 is, of course, has another job in addition to being members of
16 the legislature. These are all part-time jobs.

17 In the very midst of the heart of the campaign to
18 pull out this time is a grave inconvenience, but I don't want
19 to indicate that that's the driving factor. It would be less
20 than candid to say that the reluctance is the notion of the
21 politics of appearing in this timeframe in this. There will be
22 great reluctance.

23 I'm hoping some will agree -- if the Court doesn't
24 move the date, that some of them will agree, but this Court
25 will have fewer people testifying in this case who have the

1 best information about the lines if the trial goes forward in
2 the present time frame.

3 JUDGE PAYNE: What do you mean testimony about the
4 lines? What does that mean?

5 MR. BRADEN: Well, the Supreme Court has directed
6 that this Court should not -- should not confine its analysis
7 to conflicting portions of the line and it should do a -- they
8 say this a couple time, a holistic analysis, in other words
9 looking at every part of the district and all the surrounding
10 districts.

11 While we would have members to do it, and we've
12 talked specifically to individual members, you sit with the
13 member, you say, you have a district that has an adjoining line
14 with one of the contested districts, why is this line here, and
15 the member can say, well, it's there because there's a river
16 there, it's there because it's a county line, it's there
17 because my father owns a restaurant in that precinct. That's
18 the type of testimony.

19 We're looking at very specific testimony about lines
20 in greater detail than we gave and presented to the Court in
21 the first hearing because --

22 JUDGE KEENAN: Mr. Braden, excuse me. Judge Keenan
23 again. What would be the reluctance to testify as to the
24 substance of such fairly innocuous factual matters? It seems
25 to me what you are saying is that the issue of privilege is

1 going to be used to hold the Court hostage regarding the trial
2 date. It just doesn't have a good ring to it.

3 MR. BRADEN: I understand, and this is a little
4 different than the normal case, but we shouldn't pretend that
5 this isn't the elephant in the room. This is politics. This
6 case is political, and there's no way to avoid that.

7 The starting point, really, in some of the
8 conversations, oh, does this mean I'm going to be
9 cross-examined under oath by lawyers who represent the
10 Democratic party, and the answer to that is, yes, you are, and
11 can you limit what they ask you. I said, I can maybe limit
12 some of what they ask you, but there's going to be -- you know,
13 we're talking about a deposition, and the rules in depositions
14 provide for substantial, you know, question-answering. So
15 their concerns are of people who are in the midst of hot
16 campaigns, and these are hot campaigns for most of these
17 people, are concerns.

18 So they have an option available to them of deciding
19 not to do this. Would I prefer that everyone would say, well,
20 I don't care, I'll just do this? Yeah, of course I would like
21 that, but the reality is if we go forward with the October
22 trial date, the Court will have fewer witnesses who have
23 knowledge about this than they would get with a November trial
24 date or a September trial date.

25 JUDGE ALLEN: Mr. Braden, this is Judge Allen. What

1 specific concerns do they have? What are they fearing if they
2 do testify for us in the October trial date? I'm missing it.
3 They're going to testify truthfully and honestly, so why would
4 they be concerned about that? What examples have you been
5 given to show you that they have valid concerns?

6 MR. BRADEN: I haven't been given any example, in
7 other words, in the sense, but I have the notion that a
8 candidate --

9 JUDGE ALLEN: I'm cutting you off, but what I hear
10 you saying is that they're fearful of being cross-examined;
11 correct?

12 MR. BRADEN: They're fearful of being deposed by
13 someone representing the opposite party in the middle of a
14 political campaign, and I would think that it doesn't -- it
15 isn't necessarily -- it's what are you fearful of,
16 when-did-you-stop-beating-your-wife question type situation.

17 Certainly there are concerns about that. Are some of
18 them going to do it anyway? I hope so and I believe so, but
19 we're certainly going to limit the availability of this
20 testimony, and the testimony -- looking at the Supreme Court's
21 opinion, this Court is being directed to get more testimony
22 than was in the past, substantially more.

23 We're talking about not just looking at where there's
24 questions about what the lines look like in the sense that they
25 might conflict in sort of -- we jokingly call it an interocular

1 test, what they look like, but we're asked to look at all the
2 lines. The only way to get information about all the lines
3 from the best source is to talk to the people who represent
4 those districts. They know that their father has a restaurant
5 in a particular precinct and that's the reason why that
6 precinct is in the district.

7 Now, you are right. If that's the only testimony
8 that was elicited and there was no cross-examination, there
9 wouldn't be any reason, but it's really -- I have no difficulty
10 understanding why a political candidate doesn't want to be
11 cross-examined under oath during the middle of their campaign.

12 Leaving aside it takes them out of campaigning, it's
13 two or three days, probably minimum, out of their campaign in a
14 situation that exposes them to a bunch of questions. I can't
15 really even predict what they would be, frankly, to them. When
16 they ask me what am I going to be talking about, we're going to
17 be talking about the lines. Could they ask me these other
18 questions, and the answer I have to give them is they might.

19 JUDGE PAYNE: Mr. Braden, may I ask you this
20 question?

21 MR. BRADEN: Yes, Your Honor.

22 JUDGE PAYNE: Is it your understanding that the
23 question of legislative privilege is one that the person can
24 invoke and this Court has no power to overrule the claim?

25 MR. BRADEN: The legislative privilege is a right,

1 absolute right of the member. Could this Court overrule it? I
2 think you are a federal court, and federal courts can direct
3 them to testify, but I think we've recognized and the federal
4 courts have recognized the right of legislative privilege, and
5 I have never seen -- I don't believe there are circumstances
6 where the Court has the authority to order a member of the
7 legislature to testify as to why they voted for a bill.

8 JUDGE KEENAN: Excuse me, Mr. Braden. Judge Keenan
9 again. Your pleading you just filed with us, your memorandum
10 in support of the motion says at the bottom of page three that
11 this Court already held a claim of privilege is qualified and
12 unlikely to provide full protection.

13 So your position right now seems to be directly
14 contrary where you are suggesting that it is solely the
15 prerogative of the legislator whether to claim privilege, and
16 on page three of your motion, you say it's qualified and
17 unlikely to provide full protection. So which is it?

18 MR. BRADEN: Well, it is qualified, and it is
19 unlikely to provide full protection, but part of it is -- the
20 one that it does protect you from, and I don't think this is
21 dutiful or I don't believe the legislation, that when someone
22 asks a specific question of a member why they voted for
23 something on the floor, that's the heart of the privilege. It
24 has no meaning if they cannot refuse to answer that question.
25 Then we've basically removed it. Certainly it's qualified.

1 Certainly there are -- we recognize that there are certain
2 activities in the legislature, and we recognize there are
3 limitations on the privilege, there are limitations on the
4 context of illegal activity.

5 JUDGE KEENAN: You are saying, Mr. Braden then --
6 Judge Keenan again. So you are saying that they are reluctant
7 or will not answer why they voted for something if they're
8 asked that question before the election; is that what the
9 argument is distilled to here?

10 MR. BRADEN: I think that distills it too far. I
11 think actually, in fact, they would be willing to answer that
12 question for sure if we could limit it to that, but, of course,
13 we won't be able to limit it to that, because the plaintiff is
14 going to want to depose them and ask them a whole variety of
15 questions of which I cannot, at this point, tell them what the
16 limitations on that will be, and so --

17 JUDGE PAYNE: Mr. Braden, that he can remedied, can
18 it not, by either one of the judges or a magistrate judge
19 presiding over the deposition or positing the depositions by
20 written question or actually just an order saying tell us --
21 give us your cross-examination, opposite side, and we'll rule
22 ahead of time whether you can go into it or not by way of a
23 protective order? That kind of stuff is done all the time in
24 all kinds of litigation. I don't see that it wouldn't be
25 available here. Am I wrong about that?

1 MR. BRADEN: I think those proposals might go a very
2 long way to allay the fears of these members, and I would think
3 that that type of approach might well work, at least with some
4 of the members. Yes, I do think that approach would relieve a
5 part of the problem.

6 Let me also point out, though, we do believe there's
7 still another -- and I know this doesn't make me popular, but
8 I'll just lay it out. The lists from the plaintiffs combined
9 with the list from the defendants are 42 witnesses. There are
10 19 witnesses --

11 JUDGE PAYNE: Excuse me just a minute, Mr. Braden.
12 Since we did get into the election question, does either Judge
13 Keenan or Judge Allen, do you have questions about that at this
14 juncture?

15 JUDGE KEENAN: No, thank you.

16 JUDGE ALLEN: No, Judge Payne.

17 JUDGE PAYNE: Let's let Mr. Hamilton or whoever is
18 going to argue for the other side on the election topic now
19 that we have gone into it as extensively as we have. Then
20 we'll deal with the volume-of-witnesses situation. Mr.
21 Hamilton, are you talking?

22 MR. HAMILTON: Not yet, but I will be representing
23 the plaintiffs, yes, Your Honor.

24 JUDGE PAYNE: I mean are you the one who is going to
25 make the argument on behalf of the plaintiffs? If so, please

1 go ahead. What do you say about the election question; that
2 is, the apprehension of testifying pending the election?

3 MR. HAMILTON: Well, I'd say a couple of things.
4 First, I find it interesting the various representations that
5 Mr. Braden has made before the Court, but there is no record
6 before the Court. We're here just a few months before trial,
7 and there's a motion to move the trial date, and the burden is
8 on the moving party to establish good cause.

9 Establishing good cause does not usually mean
10 eloquence of counsel. Usually it means providing the Court
11 with a record upon which to evaluate the claim, and many of the
12 questions that are being asked this morning are the very
13 questions that would be answered by that record that, frankly,
14 is absent before the Court this morning. There's no
15 declaration. We haven't even identified any, not even one
16 specific witness, one specific delegate who has the fears or
17 who articulates the fears or he's willing to sign a declaration
18 before this Court identifying what it is that they're concerned
19 about or why it is this is inconvenient.

20 The idea that a raft of witnesses is going to say --
21 well, for a whole four-month period we're just -- we have
22 better things to do than appear before this Court or appear in
23 preparation and then for a brief period of time testifying in
24 court, you know, frankly, is dramatically inconsistent with the
25 notion of establishing good cause. That's the first point I

1 would make.

2 Second, this is inconsistent with the representation
3 and the request made of this Court just one month ago by these
4 very intervenors. The Court, of course, will recall it was
5 plaintiff's position that the record ought be considered
6 closed, that the Court's, the Supreme Court's standards be
7 applied, the parties be afforded an opportunity to brief those
8 standards as applied to the record already before the Court and
9 then the Court rule.

10 The Court rejected that position and held, no, the
11 parties should have the opportunity to conduct discovery and
12 present a new evidentiary hearing. We've relied on that, we've
13 moved forward with that and are prepared to present whatever
14 additional testimony becomes necessary during the three-judge
15 trial in October. So that's point two.

16 Point three I would make, and I think most
17 fundamentally, the map-drawer in this case, and I think this is
18 entirely undisputed, was Delegate Jones. I mean, he drew this
19 map. He was the sole map-drawer. Yes, he had input from some
20 of the other delegates, but he was the guy who took the pen and
21 drew the map, and he could not have been clearer during the
22 trial. That is record testimony that's before you.

23 He talked at great length, with the guidance of Mr.
24 Braden at trial, about all the lines of the district, and this
25 Court relied on that in its quite extensive and thorough

1 opinion discussing the evidence.

2 I find it remarkable that counsel would now stand up
3 and say there's this whole universe of other people that are
4 best positioned to provide the Court with the most detailed
5 information about specific lines when, A, they didn't draw the
6 map, we know that, and they somehow, you know, were not
7 important enough to be deposed or even called in the first --
8 put that the other way, be called or even deposed in the last
9 go-round. Now suddenly they're so important the whole trial
10 has to move.

11 So I don't think that this is good cause. I don't
12 think that the intervenors have carried their burden, and I
13 don't think that these unnamed delegates who have yet to appear
14 before this Court and say anything about legislative privilege,
15 say anything about their reluctance to testify much less the
16 inconvenience, you know, in this period of time, establishes
17 good cause, and all of this is directly inconsistent with what
18 the intervenors asked this Court and what the Court actually
19 gave them. I think it's remarkable to have parties come in
20 just four weeks later and say, in effect, never mind.

21 JUDGE PAYNE: All right, thank you, sir. Mr.
22 Raphael, do you have anything?

23 MR. RAPHAEL: No, Your Honor. We take no position on
24 this motion.

25 JUDGE PAYNE: Do either Judge Allen or Judge Keenan

1 have any questions of Mr. Hamilton?

2 JUDGE ALLEN: No, thank you. This is Judge Allen.

3 JUDGE KEENAN: No, thanks.

4 JUDGE PAYNE: Mr. Braden, do you have anything else
5 on the election issue? Then we'll move to the
6 volume-of-witnesses question.

7 MR. BRADEN: Sure. I will represent to the Court
8 that we do have a list of witnesses that we've provided to the
9 Court and to the opposing parties, ten of whom are involved in
10 active campaigns. We can, if the Court desires, provide a list
11 of who we've spoken to, and we will represent to the Court
12 without exception everyone that we've talked to is opposed, has
13 represented to us significant concerns about this. If the
14 Court wants some written representation to that effect, we
15 will, of course, do that.

16 JUDGE PAYNE: The next question is the case
17 management question of 40-something witnesses. This will
18 involve the plaintiff, too, because the plaintiff came to us
19 with the records closed, argument, and now has approximately 20
20 witnesses of its own, and the defendants, intervenor defendants
21 have 21 or 22 witnesses when, in fact, we started the trial or
22 had the trial originally with a small number of witnesses.

23 So your paper says, Mr. Braden, that you have to take
24 four depositions a day between now and whenever discovery
25 cutoff is in order to meet the trial date and that you would

1 need five days to try the case. I guess my reaction is other
2 than your assertions, I don't know -- I don't understand why it
3 would take all that time.

4 The depositions, if all you're going to do is ask the
5 witness why the line is where it is and why did you vote for
6 the bill and that's the issue that you are raising and that's
7 the issue the other side can cross-examine about, it would take
8 more than a couple hours max to take somebody's deposition, and
9 that would not make it difficult for firms of the size that are
10 involved in this case to take the depositions that need to be
11 taken well before -- if you start now, you're even before the
12 electoral season -- so you don't have to worry about that, and
13 you can move your depositions all up and get them going and get
14 that accomplished.

15 Then the next question is how long would the
16 testimony of these witnesses be at a trial so that we can have
17 some idea of what the length of the trial ought to be. With
18 those questions, I'll start it off and pass it to you, Mr.
19 Braden, on a case management component of your motion.

20 MR. BRADEN: Yes, Your Honor, you are absolutely
21 correct. If we can limit the scope of the depositions to that
22 framework, then I would agree that we could certainly do two a
23 day, or even more potentially, and if we could limit the
24 deposition of the fact witnesses in that, cabin it in that way,
25 and we will -- no matter what the Court decides, we will go

1 forward and put the resources necessary to do this.

2 There are three new expert witnesses from the other
3 side. Their testimony, I expect, will be -- you know, the
4 depositions of them would probably each go at least a day. I
5 would think these witnesses could be done relatively quickly on
6 direct.

7 I do not know what the plaintiffs have in mind, but
8 basically what we intend to ask them are, you have this line
9 which abuts this district which is challenged, you know, what
10 was the reason for that line, was race a predominant factor in
11 drawing that line to your knowledge, what do you know about
12 that line, and that would be pretty much it, because Mr.
13 Hamilton is exactly correct that this plan was drawn
14 principally by Delegate Jones, but Delegate Jones can't testify
15 now at this period of six years later, and I'm not even sure he
16 could have done it at the time, is the very specifics -- there
17 are 100 districts in the state.

18 There are many districts, as we know now, that touch
19 these districts. It's unreasonable to expect he would know
20 about every precinct that flops this way versus that on a
21 particular line. The delegates who represent those districts,
22 who live in those districts, who live in the precincts and
23 might have gone in and out and whose voters, they can't. They
24 remember. They remember why some line is drawn some way.

25 Jones, it's unrealistic to expect him to remember

1 every line everywhere, and the reason why we need these
2 additional factors, we thought the evidentiary presentation was
3 sufficient. Apparently the Supreme Court did not think it was
4 sufficient, because they repeatedly said you need a holistic
5 analysis.

6 Well, it seems to us a holistic analysis is people
7 talking about the various lines of these districts, and the
8 people best positioned to do this are the people who live in
9 those districts and represent them. So, absolutely, we can run
10 them in and out very quick on direct, and I think we could --
11 certainly if the Court would help us in limiting the scope of
12 the depositions of these witnesses, we could absolutely get the
13 depositions needed to be done on these witnesses.

14 JUDGE PAYNE: All right. But is it your view that
15 you have to have all the witnesses that were listed, or have
16 you all, for example, discussed paring down the witness list on
17 each side or stipulating to various issues, or is that really
18 just beyond the pale at this juncture?

19 MR. BRADEN: We have not discussed this. If the
20 trial doesn't get moved, we're going to get pared down, because
21 a lot of these people aren't going to agree to be witnesses.

22 JUDGE PAYNE: Wait just a minute. You have the
23 subpoena power of this court, and you can compel them to be
24 here, and if you think it's important enough for them to be
25 here, they'll have to testify. That's just the way it is.

1 When you are in this position, that's what you have
2 to do, and if you choose not to subpoena them, then that's your
3 problem, but the Court has the power to require them to be
4 here, and we'll use it. If you say they are essential
5 witnesses, all you have to do is subpoena them, and that's true
6 for both sides.

7 So that argument, in the words of Bear Bryant, that
8 and a nickel will get you a Coke.

9 MR. BRADEN: I can't remember many nickel Cokes.
10 Your Honor, it is our intention to get every -- every witness
11 that we've listed, we want to call and we intend at this
12 moment -- these are serious people that we intend to call.

13 JUDGE PAYNE: All right.

14 MR. BRADEN: We do represent clients, the Speaker of
15 the House, so, you know, I can only subpoena the people that my
16 client will permit me to subpoena, too. I'm restrained by my
17 representation to the client, just to be candid, but we intend
18 to call these people, and our hope is that we have all 23
19 witnesses we have on our list.

20 We didn't put out any names just to put names out.
21 These are people we believe each have information that would
22 help the Court make the holistic analysis necessary in this
23 case.

24 JUDGE PAYNE: All right. Judge Keenan or Judge
25 Allen, do you have any questions at this stage of Mr. Braden?

1 JUDGE ALLEN: I don't. This is Judge Allen.

2 JUDGE KEENAN: No, I don't. The only thing that I
3 would suggest perhaps, Mr. Braden and Mr. Hamilton, you
4 consider what the Supreme Court meant when it said holistic
5 analysis, and perhaps it was asking for less granularity rather
6 than more granularity, and perhaps consider that as a factor in
7 how you evaluate things here.

8 MR. BRADEN: Your Honor, this is Mark Braden. The
9 Court specifically said that the district court should not
10 confine its analysis to the conflicting portions of the line,
11 and there was -- so I think that would go, in fact, a different
12 direction.

13 The Court also said it must consider all the lines of
14 the districts at issue, again, a direct quote from the Supreme
15 Court, and that the Court would not accept any post hoc
16 justification. So all those would seem to me to be saying from
17 the Court asking for more granularity rather than less.

18 JUDGE PAYNE: Mr. Hamilton, what do you say? To
19 begin with, you said you didn't need any witnesses, and then
20 you showed up with 20 and three new experts. That changed the
21 game, according to the defendants' brief, significantly in
22 respect of how one prepares for the trial and how much time is
23 required to conduct the trial.

24 In your papers, you indicate a willingness to pare
25 your list down, but I don't know if you've had an opportunity

1 further to reflect upon that or not. To begin with those
2 thoughts, why are you putting so many witnesses on now when you
3 didn't feel like you needed any earlier, and have you been
4 able, secondly, upon reflection with these briefs that have
5 been filed, to pare the list that you have posed down?

6 MR. HAMILTON: Thank you, Your Honor, and this is
7 Kevin Hamilton for the plaintiff. First of all, of course we
8 will pare it down. I think in the first trial -- I can't
9 remember whether this was in Page or in this case, the Court
10 referred to that process as triage during the trial, Mr.
11 Hamilton, can you exercise triage, and I learned that lesson
12 well over the course of many trials, that in the beginning, of
13 course, you identify all the witnesses that you may call for
14 the purposes of reserving the right to be able to call them.

15 This is, obviously, a highly accelerated litigation,
16 and that first disclosure of witnesses was due just a matter of
17 weeks after the Court set the trial date. So we identified
18 everybody we thought we might call. We have no intention of
19 calling the majority of those witnesses, and as we've been
20 going through and interviewing the witnesses, there are some
21 that will drop off. So, yeah, it's certainly going to be true
22 that we won't call all of them.

23 With respect to the experts, we would have been happy
24 to present just Dr. Ansolabehere, the expert who testified the
25 first time, and rely exclusively on him. Unfortunately, his

1 wife suffered --

2 JUDGE PAYNE: He's out because of a family problem;
3 right?

4 MR. HAMILTON: Correct. Thank you, Your Honor. So
5 we've identified three other experts to fill in for that --
6 only, I think, I think this is fair to say, that only two of
7 them will actually be presented at trial, but there are three
8 that are doing work. Two of them work together, and, you know,
9 we're scrambling as fast as we can to complete those reports.

10 One of the reasons that we had reached out to
11 intervenors and then jointly called chambers last week to try
12 and address the Court with respect to this motion is precisely
13 because the disclosure deadlines for those expert reports are
14 coming up quickly, and so we were hoping to get an expedited
15 ruling on this very motion in advance in light of those
16 deadlines.

17 To answer the Court's question, we, of course, are
18 going to be winnowing that list, and I fully expect Mr. Braden
19 to be winnowing that list as well.

20 JUDGE PAYNE: He said, though, that he didn't think
21 he was going to winnow his too much. He's at least going to
22 call all these adjoining people, and you have a lot of people
23 who didn't appear before on your list. So at this juncture,
24 your plan is not to call all of them, but you don't know who;
25 is that a fair statement?

1 MR. HAMILTON: That's a fair statement.

2 JUDGE PAYNE: How how about your experts? How long
3 do you expect their testimony at trial to be?

4 MR. HAMILTON: Your Honor, at this point, they
5 haven't even completed their initial analysis. I don't believe
6 it will be, you know, more than it would have been if Dr.
7 Ansolabehere had testified to begin with.

8 JUDGE PAYNE: All right. He was about four hours in
9 the original trial, wasn't he, with cross-examination and
10 direct?

11 MR. HAMILTON: That sounds right, and then that, of
12 course, is premised because both sides agreed to submit into
13 evidence the actual expert reports. Both sides stipulated, and
14 that made it easy to shortcut, and I think that some of the
15 things the Court did the first time we can do here.

16 Remember, all of the evidence that was presented in
17 the first trial is before this Court. That is all a matter of
18 record, and it does -- I dare say that neither party should be
19 repeating testimony that's already in the record.

20 Number two, you know, when Mr. Braden says, you know,
21 Delegate Jones is not going to be able to remember the
22 granularity, the specific details about the lines and that's
23 the reason we need -- if you think about the end of that
24 sentence -- somebody who didn't draw the map to talk about why
25 a line went through a particular place?

1 Well, that person doesn't have that knowledge,
2 because that person didn't draw the map. That person might say
3 in his head that's why he was happy that line went there,
4 that's why I wanted that line to go there, but he can't say
5 that's why the line went there because he didn't or she didn't
6 draw that particular line. So I think some of this evidence is
7 not going to be admissible to begin with simply for lack of
8 personal knowledge.

9 JUDGE PAYNE: All right.

10 MR. HAMILTON: Other evidence is going to be
11 cumulative, and I dare say, having appeared before this Court,
12 Your Honor, Judge Payne, on two separate occasions, the Court
13 is not reluctant to point out when evidence becomes cumulative.

14 So I think that the fears here are a little
15 overblown, that the evidence can be collected, depositions,
16 efficiently. I think it can be presented efficiently either
17 with live testimony at trial or through deposition testimony
18 that's submitted. Particularly if these witnesses are so busy
19 and so concerned about the impact on their schedule, then we
20 would have no necessary objection in the main to taking the
21 witnesses' testimony and presenting it at trial by deposition
22 if the witness is unavailable.

23 JUDGE PAYNE: And you could do that by videotape
24 deposition, I assume? If you would have no objection to doing
25 it by deposition, you would have no objection to videotaping

1 it.

2 MR. HAMILTON: Right. As long as we know in advance
3 that their plan is to submit this at trial and to give us a
4 fair opportunity to cross-examine the witness as for trial as
5 opposed to as for a deposition, then, sure, or the witnesses
6 could appear by Skype. There's lots of technology that could
7 be used to streamline and to lessen the burden on these
8 individuals.

9 JUDGE PAYNE: Are you willing, Mr. Hamilton, to the
10 process of deposition by written questions as permitted by the
11 rules?

12 MR. HAMILTON: I would be very reluctant to agree to
13 that, Your Honor. I don't think that affords the plaintiffs a
14 fair opportunity to cross-examine the witness. I know it's in
15 the rules. In 30 years of practicing law, I've never used it
16 once, I've never seen it used once, and I think the reason why
17 it's in a dusty little corner of the rules is because
18 practicing lawyers recognize it's ineffective. It's an
19 ineffective way of collecting information because it allows
20 everything to go through the filter of the lawyers and it
21 allows the lawyers to prepare the witnesses to answer the
22 questions in a very controlled way.

23 JUDGE PAYNE: Are you willing to limit your
24 cross-examination to the questions that he says he's going to
25 ask which is why the lines are there and why did you vote for

1 the bill?

2 MR. HAMILTON: Well, that's a difficult question to
3 answer in the abstract. We're certainly willing to limit the
4 questions to relevant questions that go to the issue. I have
5 no interest in sitting with 23 delegates and asking them
6 questions designed somehow -- I read between the lines of Mr.
7 Braden's statement -- to assist their political opponents in
8 the current election season. I don't even know who their
9 opponents are.

10 JUDGE PAYNE: You can find out. That's all right.
11 That's not the issue. Listen, the question I have is this; how
12 about this approach: Suppose we take the deposition of one of
13 the people, and we set the parameters by -- with a judge
14 presiding over the deposition. We set the parameters there and
15 then have the deposition taken in the courthouse without the
16 judge present so that in the event you become rambunctious in
17 your cross-examination contrary to what you usually do, a judge
18 would be here to handle that? Would you be opposed to any of
19 that kind of situation?

20 MR. HAMILTON: No, of course not, Your Honor. That
21 would be fine. I think it would be taxing -- I think it's
22 unnecessary and taxing on the Court. You know, this Court has
23 always been available to the parties by phone, and I would
24 have -- I'm sure -- Mr. Braden and I have appeared across the
25 country in a large number of different litigations. I've never

1 gotten into a personal dispute with Mr. Braden. I have the
2 utmost respect for him as a lawyer.

3 JUDGE PAYNE: No, no, I didn't mean by rambunctious
4 your conduct. I meant you exceeded what you thought was proper
5 bounds of cross. Okay, you're willing to some supervision.

6 MR. HAMILTON: But in that event, resort to the Court
7 is always available by phone or by motion. I think we could --
8 if the Court were willing to make itself available for a brief
9 telephone conference in the unlikely event that we reach
10 loggerheads over the scope of deposition questions, sure, of
11 course we could take advantage of that and that opportunity,
12 but, honestly, I don't see that as an issue.

13 I don't imagine that the parties are going to
14 actually disagree about the scope of where we are going,
15 because it's going to be mainly about -- almost exclusively
16 about what participation did you have in the map, what
17 discussions in your caucus did you have about the map, what
18 discussions did you have about the black voting-age population
19 in these particular districts and the use of a 55 percent
20 benchmark rule in drawing those -- those are the things that
21 we're going to want to talk about.

22 So, you know, if there's a disagreement, I don't
23 think Mr. Braden is going to be so bold as to say, well, no,
24 no, Kevin, you get to ask about this particular precinct
25 because that's what I asked on direct and then why didn't you

1 vote for the bill and that's it, and you can't ask about the
2 black voting-age population or the strategy that was discussed
3 in caucus or your private conversations with Mr. Jones about --
4 I mean, you know, he's just not going to do that, because I
5 think even Mr. Braden would recognize all of that goes directly
6 to this. That said, it's not going to take a lot of time to --

7 JUDGE PAYNE: All right, I understand.

8 MR. HAMILTON: Most of these people are not going to
9 have that.

10 JUDGE PAYNE: Mr. Raphael, do you have anything that
11 you'd like to add to this discussion on case management?

12 MR. RAPHAEL: No, Your Honor.

13 JUDGE PAYNE: Either Judge Allen or Judge Keenan have
14 any further questions of Mr. Hamilton or Mr. Braden on the case
15 management component of the motion?

16 JUDGE ALLEN: Nothing from Judge Allen.

17 JUDGE KEENAN: Nothing, thank you.

18 JUDGE PAYNE: All right. Mr. Braden, one thing, he
19 teed up the key issue, I think, in giving you credit for not
20 doing something when he said you're not going to object to
21 questions about whether, in making your vote and whether in
22 looking at the lines you took into account the 55 percent
23 factor or the BVAP. Is it correct that you think that that is
24 appropriate cross-examination of your witnesses on the topics
25 that you have outlined that you think they need to testify

1 about?

2 MR. BRADEN: Yes. To some degree, I do believe it
3 is. I believe these -- to be candid, Mr. Hamilton is, in fact,
4 correct. These people's knowledge on these issues, they have
5 the same problem everyone else does with six years later
6 remembering conversations which, of course, they don't remember
7 them really.

8 But what they do know about is the process here
9 involved in getting a bill passed by the House of Delegates.
10 So certainly these individuals, with the exception of Jones and
11 Morgan and maybe one or two other people, didn't have -- with
12 the exception of them, these individuals didn't have any
13 influence in the broader map-drawing, but they most certainly
14 were cognizant of and involved with how their district would
15 look.

16 In reality, certainly I think these are relevant
17 questions. I think what we're going, of course, to find out is
18 these people know what they said they know. They know
19 something about their district --

20 JUDGE PAYNE: Excuse me one minute. Are you saying
21 these people, as to their districts and their lines, had
22 conversation with Jones about which we haven't heard?

23 MR. BRADEN: Oh, I think they will, in fact, remember
24 conversations that Jones doesn't remember, sure.

25 JUDGE PAYNE: So they had interaction on the topic,

1 and it wasn't explored at the earlier trial; is that right?

2 MR. BRADEN: I believe that to be absolutely, no
3 question. This was important to them, vital to their careers,
4 and this is six years later, and somebody said, I want to have
5 this precinct in my district, and to Jones it didn't make any
6 difference, and so it -- and to be candid with you, it wouldn't
7 have just been Jones.

8 I think, as we indicated, there was a consultant who
9 we're going to call as a witness this time, John Morgan, who is
10 the technical guy who sat at the machine and did that. So he
11 has knowledge that Jones doesn't have or doesn't remember.

12 JUDGE PAYNE: All right. Okay. I think everybody
13 had their say.

14 MS. McKNIGHT: Your Honor, if I might, this is Kate
15 McKnight for defendant intervenors.

16 JUDGE PAYNE: Yes.

17 MS. McKNIGHT: We have discussed an issue with
18 plaintiffs' counsel, and they agree it would be useful to get
19 additional clarity from the Court on two points in your
20 June 2nd order. What would be the best way for us to present
21 those questions to the Court?

22 JUDGE PAYNE: Well, what are they?

23 MS. McKNIGHT: Sure. Very generally it has to do
24 with paragraphs two and seven of the June 2nd order. In
25 paragraph two -- I'll keep this brief, Your Honor. In

1 paragraph two, it contemplates a brief identifying portions of
2 the record, but paragraph two does not provide a due date for
3 that brief. So that's one question.

4 The second question has to do with paragraph seven.
5 It contemplates a full round of briefing on any issues not
6 agreed to in the discovery plan that we filed last night, and
7 we wondered if the Court contemplated something more than just
8 scheduling squabbles for that full -- because it is a full
9 round of briefing.

10 JUDGE PAYNE: If you have scheduling problems -- or
11 scheduling problems or what you were going to be doing, it
12 looks to me like you're basically in agreement on those things.
13 I don't know that we'll be in agreement with them, but I think
14 seven contemplates more if you have fights over the scope of
15 what you're doing or what you're doing. Does that help you?

16 MS. McKNIGHT: A little bit.

17 JUDGE PAYNE: Two, we'll give you a due date.

18 MS. McKNIGHT: Only, Your Honor, one follow-up
19 question. On paragraph seven it refers to paragraph six, and
20 paragraph six, for us, we just scheduled dates. We did not
21 discuss or identify disagreements about scope in our
22 preparation of the paragraph six plan.

23 JUDGE PAYNE: The order means what it says. It
24 refers you back to whatever you were dealing with in paragraph
25 six. So I gather you have no basic dispute over that based on

the plan, but I haven't studied it carefully. Is that correct or wrong?

MS. MCKNIGHT: That's correct, Your Honor. We can read it on face value. We were concerned that a full round of briefing suggested that we were expected to do something more with paragraph six.

JUDGE PAYNE: I think not.

MS. McKNIGHT: Okay, thank you, Your Honor.

JUDGE PAYNE: All right, Judge Keenan and Judge Allen, do you want to reconvene after a 15-minute break for us to talk a little bit? Does that suit you all?

JUDGE KEENAN: That's fine.

JUDGE PAYNE: Ms. Hooper will place the call then.

JUDGE KEENAN: Thank you very much everybody.

MS. McKNIGHT: Thank you, Your Honor.

JUDGE PAYNE: Thank you for being available on short notice. Thank you.

MR. HAMILTON: Thank you, Your Honors.

(End of proceedings.)

I certify that the foregoing is a correct transcript
from the record of proceedings in the above-entitled matter.

P. E. Peterson, RPR

Date